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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. ~~214~~ 17

ALBERT A. HOEPER, APPELLANT,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY, WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED FEBRUARY 7, 1931

(35,636)

(35,636)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 714

ALBERT A. HOEPER, APPELLANT,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY, WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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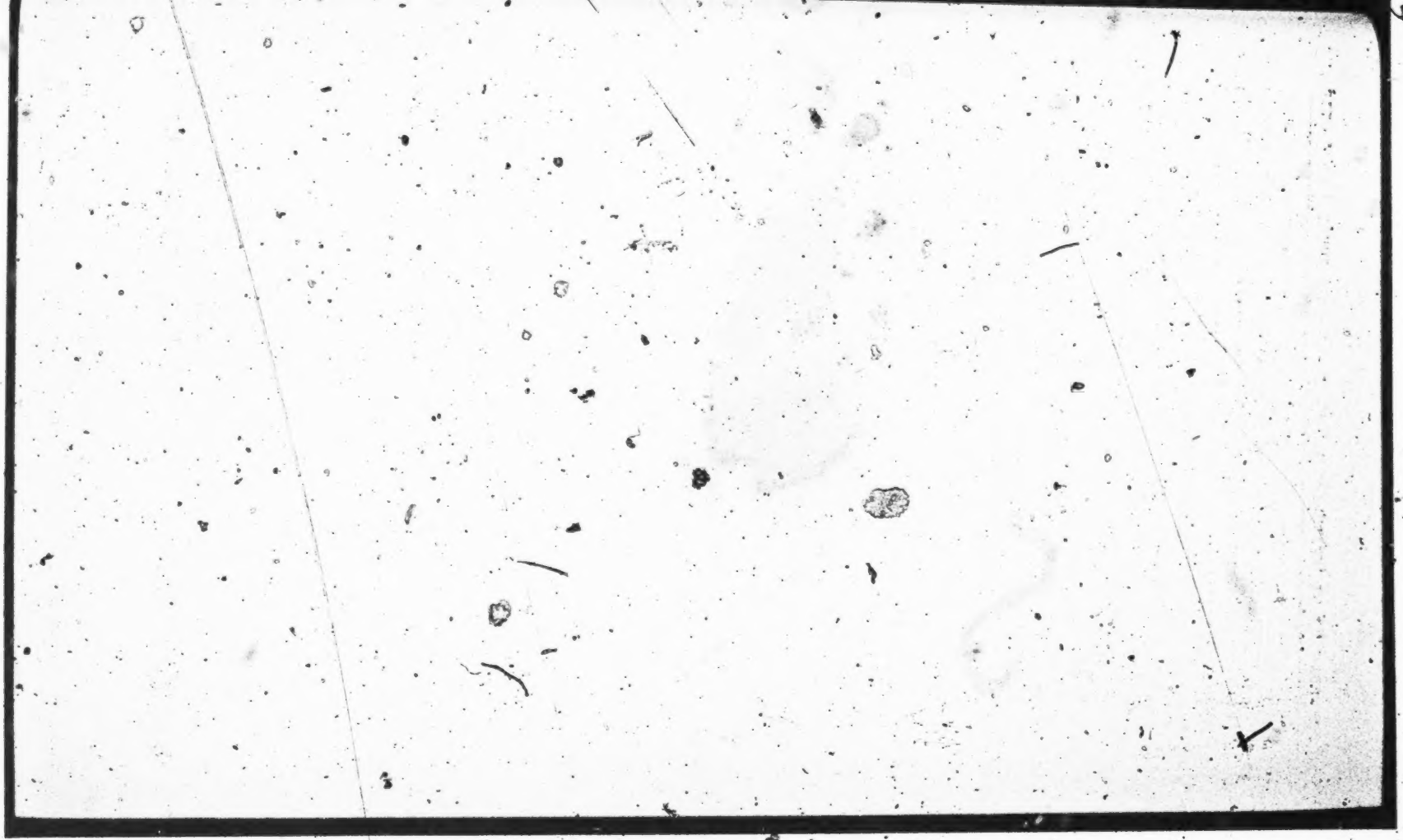

[fol. 1] Original

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

ALBERT A. HOEPER, Appellant,

vs.

TAX COMMISSION OF WISCONSIN and MARATHON COUNTY OF WISCONSIN, Respondents

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed Jan. 21, 1931

The above named Albert A. Hoeper, a resident of Marathon County, Wisconsin, considering himself aggrieved by the final judgment of the Supreme Court of the State of Wisconsin rendered November 11, 1930 in the above entitled cause, affirming the judgment of the Circuit Court for Marathon County, denying this appellant a portion of the recovery prayed for in his appeal to said Circuit Court, hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United States herein to the end that said judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of the bond required of appellant herein on such appeal.

Assignment of Errors

The said appellant assigns the following errors in the record and judgment of said Supreme Court of Wisconsin, to-wit, that said Supreme Court erred in its said decision as follows:

1. In holding that Section 71.05 (2d) of the Statutes of Wisconsin, pursuant to which a tax was levied on this appellant because of income received by his wife from her own separate estate, does not violate the Fourteenth Amendment to the Constitution of the United States.

[fols. 2 & 3] 2. In holding that Section 71.09 (4c) of the Statutes of Wisconsin, pursuant to which a tax was levied on appellant on his own income at a higher rate because his wife also had separate income from her own separate estate than is levied on other persons of like income from like sources as appellant, does not violate the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

For these errors said appellant prays that the judgment of the Supreme Court of the State of Wisconsin be reversed and judgment ordered granting to the appellant the relief prayed for in his appeal to the Circuit Court for Marathon County from the tax assessment complained of.

Albert A. Hoeper, Appellant. Claire B. Bird, of Bird, Smith, Okoneski & Puchner, Attorney for Appellant.

[fol. 4] Original

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL AND APPROVING BOND—Filed Jan. 21, 1931

The above named appellant having presented and filed his petition for appeal, assignment of errors claimed, and praying for reversal of the final judgment of the Supreme Court of the State of Wisconsin, all pursuant to statute and rules of the Supreme Court of the United States in such case made and provided, and this Court being desirous that justice be done in the premises,

On motion of Claire B. Bird, attorney for appellant,

It is now here ordered that the appeal prayed for be and the same is hereby allowed in the Supreme Court of the United States from the judgment of the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law.

Further ordered that the Clerk of the Supreme Court of Wisconsin prepare and certify a transcript of the record, proceedings, opinions and judgment in the above entitled cause and transmit the same to the Supreme Court of the United States so that the same shall be in said court within thirty days from this date.

Further ordered that security for costs on such appeal is hereby fixed in the sum of Five Hundred Dollars [fols. 5 & 6] ($500.00), and the bond to that effect filed in this court is hereby approved as to form and sufficiency of sureties.

Dated at Madison, Wisconsin, this 22nd day of January, 1931.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fols. 7-15] Citation, in usual form, showing service on G. J. Boileau et al., filed Jan. 30, 1931, omitted in printing.

[fol. 16] Copy

IN CIRCUIT COURT OF MARATHON COUNTY

In the Matter of the Appeal of A. A. HOEPER and FLORENCE M. HOEPER from Assessment of Income Tax on Income of Years 1926 and 1927

A. A. HOEPER, Plaintiff and Appellant,

vs.

WISCONSIN TAX COMMISSION and MARATHON COUNTY, Defendants and Respondents

NOTICE OF APPEAL—Filed in Supreme Court April 25, 1930

To T. W. Brazeau, Special Counsel for Wisconsin Tax Commission, and G. J. Boileau, District Attorney for Marathon County:

Please take notice that the above named A. A. Hoeper, designated as plaintiff, hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the judgment rendered herein on the 10th day of March, 1930, which adjudges that the assessment referred to in the proceedings herein is valid and is confirmed to the extent of $214.50 and adjudging that the said plaintiff and appellant is not entitled to recover any portion of the payment more than the excess paid above said amount.

Dated this 13th day of March, 1930.

Bird, Smith, Okoneski & Puchner, Attorneys for A. A. Hoeper, Appellant.

Admission of Service and Waiver of Bond

The undersigned hereby admits service this 14th day of March, 1930, of the above notice of appeal and hereby, expressly waive the giving of any bond or undertaking by said appellant on said appeal.

T. W. Brazeau, Special Counsel for Wis. Tax Commission; G. J. Boileau, District Attorney, for Marathon County.

[File endorsement omitted.]

[fol. 17] Clerk's certificate to transcript omitted in printing.

[fol. 18] Copy

In Circuit Court of Marathon County

In the Matter of the Appeal of A. A. Hoeper and Florence M. Hoeper from Assessment of Income Tax on Income of Years 1926 and 1927

Notice of Appeal—Filed June 26, 1929

To E. H. Kuhlmann, County Clerk for Marathon County, Assessor of Incomes for Marathon County, and Tax Commission of Wisconsin:

You are hereby notified that A. A. Hoeper and Florence M. Hoeper, his wife, do hereby each appeal to the above named Court from that particular decision of the Tax Com-

mission of Wisconsin, dated May 23, 1929, which affirmed the determination of Income Tax Board of Review for Marathon County sustaining an assessment by the Assessor of Incomes of Marathon County of $292.19 upon the appellant A. A. Hoeper because of income received by him and Florence M. Hoeper, during the years 1926 and 1927.

The objection to such assessment and confirmation thereof is that the income of each should have been assessed to each respectively and with the exemption allowed each up to October 22, 1927, the date of their marriage, and at no higher rate than if both had been single during all of said years and had so remained.

The errors assigned are that such assessment was made to Mr. Hoeper alone on the income of both instead of assessing to him only the income on his own and further is made at a higher rate and without the exemptions as above stated.

The facts upon which this appeal is based are:

A. A. Hoeper and Florence Rowley from January 1, 1926 to October 22, 1927 were both single, each having separate property and income. Each had been married before and was the head of a family during the whole period until October 22, 1927, on which date they were married.

Each make a separate return of 1927 income as well as 1926.

[fol. 19] Mr. Hoeper showed:

Income:

	1926	1927
Salary	$7,150.00	$7,150.00
Dividends and Interest	1,203.00	3,259.25
Sale of Real Estate	2,363.00	.....
	10,716.00	10,409.25
Deductions:		
Deductions and contributions	2,366.75	3,657.34
Net income	$8,349.25	$6,751.91
Amended Return deducting homestead taxes leaves Net	$6,160.68	.....

Mrs. Hoeper showed:

Income:		
Salary	$2,400.00	$2,400.00
Dividends and Interest	146.40	143.91
Partnership Distribution	1,435.04	1,519.52
	3,981.44	4,063.43
Deductions:		
Deductions and Contributions	257.12	271.73
	$3,724.32	$3,791.70

The $2,400.00 salary was received monthly. The $1,435.04 and $1,519.52 was her share of distribution above salary from an Insurance Agency business, with which Mr. Hoeper had no connection. Of the $1,519.52 in 1927, $1,417.17 was received before October 22.

The Assessor of Incomes made one assessment of $292.19 to Mr. Hoeper, computing the rate and deduction as if they had been married during the entire year. This made the tax materially more than if each had been assessed separately, either for the whole year or for the portion when they were both single. The amount of the excess is not stated in the record, but the Commission statistician can more readily compute it than can we.

On July 14, 1928 Mr. Hoeper paid this tax of $292.19 under protest.

[fol. 20] On August 2, 1928, Mr. and Mrs. Hoeper appealed to the County Board of Review and Mr. Hoeper also filed a claim for refund of the illegal excess paid. The claim for refund has never been allowed and the County Board of Review disallowed the claim entirely on appeal as did the Tax Commission on appeal to them.

All of the provisions of Sections 71.12, 71.14 and 71.15 and other precedent requirements have been duly complied with.

The propositions of law relied upon may be stated thus:

1. There is no authority in law to tax Mr. Hoeper because of Mrs. Hoeper's income either (a) received prior to their marriage, or (b) subsequent thereto.

2. R. S. 71.05 (2d) attempting to do so, only applies by its terms to income received after marriage.

3. R. S. 71.05 (2d) violates both State and Federal Constitutions.

4. R. S. 71.09 (4c) attempting to tax Mr. Hoeper at a higher rate than if he had not married violates both State and Federal Constitutions, both as to (a) his income received before marriage, and (b) his income received after marriage.

5. R. S. 71.09 (4c) attempting to levy a tax, which Mrs. Hoeper was either legally or morally required to pay, at a higher rate than if she had not married Mr. Hoeper likewise violates both State and Federal Constistutions as to her, both as to (a) her income received before marriage, and (b) her income received after marriage.

6. R. S. 71.05 (2e) does not and cannot constitutionally apply to income for the year 1926, or proportionately until October 22, 1927 to income for the year 1927.

Dated at Wausau, Wisconsin, May 27, 1929.

A. A. Hoeper and Florence M. Hoeper, by Bird, Smith, Okoneski & Puchner, Their Attorneys.

[fol. 21] CIRCUIT COURT, MARATHON COUNTY

In the Matter of the Appeal of A. A. Ho[illegible] and FLORENCE M. HOEPER from Assessment of Income Tax on Income of Years of 1926 and 1927

STATE OF WISCONSIN,
Marathon County, ss:

C. B. Bird, being duly sworn on oath says that on the 27th day of May, 1929, he duly served the foregoing notice of appeal by delivering the original thereof to the County Clerk, whose admission of service is hereon endorsed and by mailing a copy thereof to the Assessor of Incomes of Marathon County and two copies thereof to the Tax Commission of Wisconsin at Madison, Wisconsin, all in the manner required by law.

C. B. Bird.

Subscribed and sworn to before me this 27th day of May, A. D. 1929. Isabelle K. Horne, Notary Public, Marathon County, Wisconsin.

[fol. 22] [File endorsements omitted.]

[fol. 23] Copy

[File endorsement omitted]

IN CIRCUIT COURT OF MARATHON COUNTY

[Title omitted]

ANSWER—Filed Nov. 9, 1929

The above named defendant for answer in the above entitled action admits that an income assessment was made upon and against the income of the plaintiffs by the income assessor of the amount alleged, which was affirmed and sustained by the county board of review and an appeal taken therefrom to the state Tax Commission and the review of such assessment was thereafter made by the Tax Commission and said assessment affirmed and ratified and held valid by the Tax Commission; thereafter an appeal was taken by the plaintiffs from the said decision and assessment by the Tax Commission to the circuit court of said county; and thereafter a return was duly made by the Tax Commission to the said court of all documents, papers, evidence, statements and exhibits on file in the matter and all testimony taken therein, all in the manner and as provided by law.

For further answer in said case, defendant alleges that the said assessments and all said proceedings thereon were duly made in accordance with law, and that said assessments were legal, lawful and valid assessments, and made in accordance with and authorized by law and Chapter 71 of the Statutes; and defendant denies that said laws were invalid or unconstitutional, but defendant alleges that said laws and all the proceedings as taken in the making of said assessments were valid, legal and constitutional and should be sustained, approved and affirmed in this action.

[fol. 24] For further answer to said complaint, defendant

denies each and every allegation therein except as herein admitted or modified.

Wherefore defendant demands judgment denying plaintiffs relief and dismissing this action with cost.

John W. Reynolds, Attorney General; T. L. McIntosh, Assistant Attorney General; Gerald J. Boileau, District Attorney, Attorneys for Defendant, Wisconsin Tax Commission.

[fol. 25] [File endorsement omitted]

IN CIRCUIT COURT OF MARATHON COUNTY

[Title omitted]

BRIEF OF DEFENDANT—Filed Nov. 9, 1929

We submit the record shows that the proceedings in making this assessment were regular and conformed with the provisions of the statute, and that the statute is a valid and constitutional method of taxation and imposes a "personal obligation not a levy upon property," and is valid under the constitution.

State ex rel. Sallie F. Noon Co. v. Wis. Tax Comm., 166 Wis. 287.

An income tax is not levied on property, funds or profits, but on the right of an individual or corporation to receive income or profits and is a valid method of taxation.

Paine v. City of Oshkosh, 190 Wis. 69;
Income Tax Cases, 148 Wis. 456;
State ex rel. Globe Steel Tubes Co. v. Lyons, 183 Wis. 107.

Plaintiff in this case claims that under the Commission's construction of the law, her rights have been changed and she is prejudist because of her marriage to her present husband, it being her second marriage. We think the Commission's decision sufficiently explains that. Clearly under the provisions of Chapter 71, taxes are to be levied and paid by every person, and that includes corporations, associations and individuals of all kinds. In administering

the tax law like all other laws, classifications have to be made and that was done and applied here.

[fol. 26] Both the federal and state constitutions permit of just and proper classification for taxation purposes.

Kiley v. Chicago M. & St. P. R. Co., 142 Wis. 154;
Ladd v. Minneapolis St. P. & S. S. M. R. Co., 142 Wis. 165;
Borgnis v. Falk Co., 147 Wis. 327,
Income Tax Cases, 148 Wis. 456.

The necessity and propriety of classification of property then subject to taxation had to be determined by the Legislature and cannot be disturbed by the court within the rule requiring substantial distinctions between the classes.

Kiley v. Chicago, M. & St. P. R. Co., 138 Wis. 215;
Nitka v. Western Union Tel. Co., 149 Wis. 106.

It was held in the case of State ex rel. Atwood v. Johnson, 170 Wis. 218, that under the amendment to the constitution, while the uniformity clause of the constitution applies to property tax it has no application to income tax.

It is a well established rule of law that statutes are to be upheld by the courts unless they are unconstitutional beyond any reasonable doubt.

Pauly v. Keebler, 175 Wis. 428.

Without going further into an analysis of the law or the facts in this case, we cite the opinion and decision of the Tax Commission as fully covering the subject, and we think it is a proper analysis of the law as applied to the facts in this case and that decision should be affirmed and the taxes paid.

John W. Reynolds, Attorney General; T. L. McIntosh, Assistant Attorney General; Gerald J. Boileau, District Attorney, Attorneys for Defendant, Wisconsin Tax Commission.

[fol. 27] Due and personal service of the within admitted this 9th day of Nov. 1929.

Bird, Smith, O. & P. Attorneys for Plff.

[File endorsement omitted.]

[fol. 28] Copy

IN CIRCUIT COURT OF MARATHON COUNTY

In the Matter of the Appeal of A. A. HOEPER and FLORENCE M. HOEPER from the Assessment of Income Tax on Income of Years 1926 and 1927

OPINION—Filed Feb. 25, 1930

It appears that A. A. Hoeper and Florence M. Hoeper were married October 22, 1927 and previous thereto, during the year 1926 and 1927 they were each a single person and each possessing separate property and earning separate incomes. Mr. Hoeper's net income subject to taxation was in 1926, $8,349.25 and in 1927, $6,751.91, an average of $7,252.56. It also appears that Mrs. Hoeper's taxable income was in 1926, $3,724.32 and in 1927, $3,791.70, an average of $3,758.

In assessing incomes in 1928 the Assessor added the average income of Mrs. Hoeper to that of Mr. Hoeper and computed the tax upon the total, thus bringing the rates into the higher brackets and making the total tax $292.19, after making allowance for exemptions of $17.50 and adding the teachers surtax.

This is approximately $100 more than would have been assessed had the incomes been treated separately and the tax assessed to each.

The statute provided that "in computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under 18 years of age shall be added to that of the husband or father."

The validity of this provision is questioned in this action. If this Court were free to treat this as a case of first im-
[fol. 29] pression it would be impelled to hold the provision quoted to be invalid for unwarrated and discriminatory classification.

It is sufficiently well established to make discussion unnecessary that in imposing income taxes there may be classification of tax payers but that in order to be valid there must be some proper basis for the classification; that there must be no distinction within the class, and that the classification must be consistent with natural justice and

based upon substantial distinctions which make real differences.

We have in the statute before us a separate classification of husbands and their wives and children under the age of 18 years residing together, and it is provided that their incomes shall be added together and the husband or father required to pay a tax computed on the total amount, thus bringing the tax on the income of the wife and the income of the children into the higher brackets and assessing the tax as if the entire combined incomes constituted the income of the husband and father only. The inequity of this rule seems rather apparent when applied to the income of husband and wife.

We have reached that advanced stage in the legal rights of women when the legal status of women is at least as great as to that of men, and in some particulars greater. There is no distinction between a married and an unmarried woman in respect to such legal status. The statute declares that "Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying [fol. 30] property, care and custody of children, and in all other respects". (Sec. 6.015.) Her freedom of contract includes her right to make earnings separate from her husband and completely control them. She may enter into a partnership with her husband (Sparks vs. Kuss, 195 Wis. 378). She may sue her husband upon any cause of action she possesses, the same as if she were unmarried. (Wait vs. Pierce, 191 Wis. 202.) She may become a surety. (Bank vs. John, 179 Wis. 117.) And indeed there is no particular in which a married woman's husband has any right to or control over property or income or cause of action of his wife. She may convey her property without his consent, although he can not do the same as to his property.

The situation as to father and minor children is quite different. The father has the right to the earnings of the child and is legally bound to support the child, and the combining of the incomes of the two would be reasonable and would afford basis for proper classification. But it is difficult to see any such basis for uniting the incomes of husband and wife. It would not be contended that two or more brothers and sisters residing together in one family,

keeping house together but working independently and having independent incomes could be properly classified so as to combine the incomes of all and tax the oldest, for instance, or some one of the several, on the basis of the total income, thus putting the tax into the higher brackets. Yet the brothers and sisters may be not less intimate nor less closely related nor more independent of each other in prop-
[fol. 31] erty and income matters than are husband and wife.

Suppose a father or a mother has adult sons and daughters living in his or her family in the same intimate way that all families live together but the children are each employed or engaged in business separately and earning separate incomes and contributing to the household in accordance with reasonable obligations. Would any one contend that all of such members of a family might have their incomes combined for the purpose of income tax and the tax assessed upon the father or the mother on the basis of the total, thus again putting the tax into the higher brackets and imposing a penalty upon the manner of the family life?

It would seem that putting the incomes of husband and wife together in one classification, as is done, is not based upon any substantial distinction making a real and reasonable difference.

However, our Supreme Court has held in Income Tax Cases, 148 Wis. 456, 513-514, that the provision we have under consideration is valid, placing the validity of the classification upon the basis that it was necessary to prevent colorable shifts and transfers of property in order to secure double or even triple exemptions, saying that the close relationship of husband and wife makes opportunity for fraud and evasion in this manner.

True, this basis for classification has been declared insufficient in the case of Schlesinger vs. Wisconsin, 270 U. S., 228, 240. The Court there held that the necessity to prevent evasion is not a sound basis for classification and that it is not permissible to say "A may be required to submit to an
[fol. 32] exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity."

Counsel for the State say that the Legislature may also have had in mind the fact that due to the intimate relation of husband and wife there is a joint enjoyment of the income of each which in fact is equivalent to a greater income than either would have separately. This Court can not see the difference between the relation of husband and wife and the relation of other members of a family, as we have noted.

But the ruling in the Income Tax Cases still stands and not overruled and this Court feels bound by the decision until it is changed.

Appellants also urge that there was no authority, in making the assessment in question, to combine the incomes of Mr. and Mrs. Hoeper acquired by them before their marriage in the year 1927 for the purpose of taxation of Mr. Hoeper. This Court can not escape the force of that contention, and it appears that the statute does not authorize such combination.

The Statute, Sec. 71.05 (2) (b) provided that the exemption for a husband and wife should be $17.50, and that the personal exemptions of each person should be determined by the personal status of the taxpayer on the last day of the last year included in the computation of the income. That rule fixed the exemption to which Mr. and Mrs. Hoeper were entitled at the sum of $17.50 because on the last [fol. 33] day of the year 1927 they were husband and wife.

The statute, Sec. 71.05 (2) (d) provided that "in computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under 18 years of age shall be added to that of the husband or father".

Taking these provisions literally and also in their true meaning they in no manner authorize the adding to the income of the husband the income of one who was not his wife when the income was earned. The earnings of Florence M. before she became Mrs. Hoeper were not earnings of the wife of Mr. Hoeper. Only earnings of his wife might be added to the earnings of Mr. Hoeper, and until they were married his wife made no earnings. That would seem self evident.

It is nowhere provided that in arriving at the amount of income of a man for a given year who becomes a husband during that year, the income of one who was not his wife at

the time of earning or receiving the income should be added to his; nor does the statute declare that the status of husband and wife for the purpose of determining the total amount of income taxable to the husband shall be fixed for the whole year by the status at the end of the year. The provision in respect to status at the end of the year applies only by the very terms of the statute, to determination of the "personal exemptions". Sec. 71.05 (2) (E).

This Court can not escape the conclusion that in arriving at the income tax of Mr. Hoeper there could be included in his earnings only the earnings of his wife after she became [fol. 34] his wife, October 22, 1927.

In the year 1927, during the period before Florence M. became Mrs. Hoeper, she had earned and received of her income for the year $2,000 of salary and $1,417.17 of other income, which amounts, less deductions of $271.73, in the Court's opinion, should be deducted from her taxable income for the year of $3,791.70 and only the net balance could be legally added to the income of Mr. Hoeper for the purpose of arriving at his taxable income for the year 1927. Florence M.'s earnings for the year 1926 must be considered non-existent in so far as we are concerned with the computation of Mr. Hoeper's tax based on his income of 1927 and 1926." This method of computation makes a very material difference in the amount of the tax and the excess paid in by Mr. Hoeper should be recovered by him.

Findings may be prepared in accordance with the foregoing.

Dated February 25, 1930.

A. H. Reid, Judge.

[File endorsement omitted.]

[fol. 35] Copy

[File endorsement omitted]

In Circuit Court of Marathon County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Mar. 8, 1930

This appeal being regularly brought on for hearing upon the record as returned by the Tax Commission and issue

joined and briefs filed, and upon oral argument, Messrs. Bird, Smith, Okoneski & Puchner appearing for appellants, A. A. Hoeper and Florence M. Hoeper, and G. J. Boileau, District Attorney of Marathon County, appearing for Marathon County, and T. W. Brazeau, special counsel, appearing for the Tax Commission, and the Court, having filed a written opinion, now makes and files the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. On January 1, 1926, A. A. Hoeper was a widower, and Florence M. Rowley a widow, each the head of a family, and in income tax returns for the income of 1926 each claimed exemption as head of a family.

Each so continued until October 22, 1927, when they married, and in their return of 1927 income Mrs. Rowley, then Mrs. Hoeper, claimed exemption as head of a family, maintaining a home up to the date of said marriage.

Each made full and correct returns of income.

2. During all of said years 1926 and 1927 each of said claimants had taxable income, all of which was derived from each one's separate earnings and business, respectively, and the property of neither was received by gift, transfer or otherwise from the other, and each one's income was his or her separate income, respectively.

[fol. 36] 3. A. A. Hoeper's income subject to taxation in 1926, after deduction, was $8,349.25, and in 1927, $6,751.91.

4. Mrs. Florence M. Rowley's income subject to taxation in 1926 was $3,724.32, and in 1927, up to October 22, was $3,289.35, and from October 22, 1927 to the end of the year was $502.35, a total for 1927 of $3,791.70.

5. The Assessor of Incomes in 1928 assessed a tax upon all of said income to A. A. Hoeper in all respects as if he himself during all of both of said years owned all of said property and himself personally received all of said income, which tax so assessed amounted to $292.19.

6. A. A. Hoeper made all required protests and was compelled to, and did, pay said tax under due protest in 1928 and has complied with all the requirements for maintaining this action for the recovery of such portion thereof as may be found to be an unlawful exaction.

7. If the tax had been computed by taxing the income up to the date of marriage separately to each and the income thereafter of both to A. A. Hoeper, and allowing one exemption only and that to A. A. Hoeper, the tax, including surtax, would have amounted to $214.50 and no more. The excess of the amount collected above said amount is $77.69.

8. If the tax had been computed by assessing each one's income for all of said years severally, as if they were not husband and wife, the tax including surtax assessed to Mr. Hoeper should have been, after deducting $17.50 exemption, $158.36. The excess collected of him above said amount is $133.83.

9. The tax so assessed to Mrs. Hoeper, including surtax, would have been $52.75 less such exemption as should properly be allowed her.

[fol. 37] Conclusions of Law

1. I conclude, for reasons stated in the opinion, that the plaintiff, A. A. Hoeper, is entitled to recover the sum of $77.69, being the excess of tax collected over the amount lawfully assessable as above provided, and is not entitled to collect any more than that amount.

Let judgment be entered accordingly by the Clerk.

Dated Wausau, Wisconsin, March 8, 1930.

By the Court:

A. H. Reid, Judge.

[File endorsement omitted.]

[fols. 38 & 39] Copy

In Circuit Court of Marathon County

In the Matter of the Appeal of A. A. Hoeper and Florence M. Hoeper from the Assessment of Income Tax on Income of the Years 1926 and 1927

Judgment—Mar. 10, 1930

This appeal having duly come on for hearing, Messrs. Bird, Smith, Okoneski & Puchner appearing for the appellants, A. A. Hoeper and Florence M. Hoeper, G. J. Boilean,

District Attorney, for Marathon County, and T. W. Brazeau, Special Counsel, for the Tax Commission, and the Court having filed a written opinion and Findings of Fact and Conclusions of Law directing the entry of this judgment, now, therefore,

It is adjudged that the assessment made in 1928 to A. A. Hoeper upon income for the years 1926 and 1927 received by said A. A. Hoeper and Florence M. Rowley, who on October 22, 1927, became the wife of A. A. Hoeper, is adjudged illegal and void insofar as it assesses more than $214.50 to said A. A. Hoeper, and is ratified and confirmed to the extent of the assessment of $214.50 to said A. A. Hoeper.

Further adjudged that the said A. A. Hoeper have and recover from Marathon County the sum of $77.69, being the excess paid to the Treasurer of said county upon said assessment over and above the amount hereby adjudged lawful and valid.

Dated Wausau, Wisconsin, March 10, 1930.

By order of the Court.

H. A. Beilke, Clerk.

[File endorsement omitted.]

[fols. 40 & 41] IN SUPREME COURT OF WISCONSIN

In the Matter of the Appeal of A. A. HOEPER and FLORENCE M. HOEPER from Assessment of Income Tax on Income of Years 1926 and 1927

A. A. HOEPER, Appellant,

vs.

WISCONSIN TAX COMMISSION and MARATHON COUNTY, Respondents

Marathon Circuit Court

Opinion by Justice Wickham

JUDGMENT—Nov. 11, 1930

This cause came on to be heard on appeal from the judgment of the Circuit Court of Marathon County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judg-

ment of the circuit court of Marathon County, in this cause, be and the same is hereby affirmed.

[fol. 42] Copy

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

In re Appeal of A. A. HOEPER et al. from Assessment of Income Tax

A. A. HOEPER, Plaintiff and Appellant,

v.

WISCONSIN TAX COMMISSION and MARATHON COUNTY, Defendants and Respondents

Appeal from a Judgment of the Circuit Court for Marathon County. A. H. Reid, Circuit Judge. Affirmed

The appellant, A. A. Hoeper, brought this action on May 27, 1929, to contest an assessment of income taxes based on income of 1926 and 1927, for the reason that he was assessed not only on his income but on that of his wife, Florence M. Hoeper, whom he married on October 22, 1927. The trial court, by a judgment entered March 10, 1930, held void so much of the assessment as affected income prior to October 22, 1927, but held valid the remainder of the assessment.

The commission appealed from that part of the judgment which denied the right to combine incomes prior to marriage, but this appeal has been abandoned.

OPINION—Filed Nov. 11, 1930

[fol. 43] WICKHEM, J.:

Appellant contends that sub. (2)(d) of sec. 71.05, and sub. (4)(c) of sec. 7109, Stats., are unconstitutional in that both violate the Fourteenth Amendment to the Federal Constitution, and Art. VIII, sec. 1, of the Wisconsin Constitution. Sub. (2)(d), sec. 71.05 reads as follows:

"In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation."

Sub. (4)(c), Sec. 71.09, provides:

"Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."

Appellant's claim is that Art. VIII, sec. 1, Const., limits the powers to tax incomes to a levy against the recipient of the income; that a tax assessed to the husband on income of his wife is in excess of the powers granted. It is further contended that these sections violate Art. VIII, sec. 1, of the Wisconsin Constitution, and the Fourteenth Amendment to the Federal Constitution, in that they make an arbitrary and discriminatory classification as to the amount of the tax levied on persons of the same income from the same sources in the same natural class. The provisions in question were attacked in Income Tax Cases, 148 Wis. 456, 135 N. W. 164, and their validity sustained. The court said in that case:

[fol. 44] "Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of each child under eighteen years of age living with its parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We

think there clearly is such a difference, in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or parent and child makes possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestionably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately."

This decision has been acquiesced in for nearly twenty years, and there appears to be no reason for re-opening the question unless the decision of the United States Supreme Court in Schlesinger v. Wisconsin, 270 U. S. 228, 70 L. Ed. 557, compels a re-consideration of the matter. In the Schlesinger Case a tax was levied upon certain gifts made within six years of the death of the donor. It was found as a fact that the gifts so taxed were not made by the donor in contemplation of death. The tax was levied under the provisions of sec. 1087-1, Chap. 64ff, of the Wisconsin Statutes of 1919. In substance, this section provided for a tax on inheritance and on all gifts made in contemplation of death of the donor, or intended to take effect in possession or enjoyment at or after such death. The statute further provided:

"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

[fol. 45] The court held that there was no adequate basis for a distinction between gifts made inter vivos within six years of death but in fact made without contemplation thereof, and like gifts made at other times. The court said:

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be

required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B". Rights guaranteed by the federal constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"No new doctrine was announced in Stebbins v. Riley, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Mobile, etc. R. R. v. Turnipseed, 219 U. S. 35, 43, discusses the doctrine of presumption."

The contention of the appellant is that the Schlesinger Case has repudiated the basis upon which the decision in Income Tax Cases, supra, purports to rest, and requires that the latter case be overruled in so far as it establishes the validity of sub. (2) (d), sec. 71.05, and sub. (4) (c), sec. 71.09, Stats. To this we cannot agree. It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may effectively be collected from another, without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification, based on the marriage relation, is wholly arbitrary and unreasonable in connection with the imposition of an income tax. We cannot agree that it is. The marriage [fol. 46] relation has always been a matter of great public concern. As was said in Boehmer v. Kalk, 155 Wis. 156, 160, 144 N. W. 182:

"The marriage relation is one of the most important of those fundametal social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great. Consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation, by such reasonable and ap-

propriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect."

The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax. The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well-recognized social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income.

In Income Tax Cases, supra, it was recognized that the advantages enjoyed by a group over individuals might [fol. 47] be the basis for a classification with respect to exemptions.

"A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them to partnerships is unjust discrimination. The question depends, of course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain distinct and well known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish." Income Tax Cases, 148 Wis. 456, 511, 135 N. W. 164.

It is of course true that there may be some families in which the husband enjoys the benefit solely from his in-

come, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated, has no bearing upon the reasonableness of the classification. The question with respect to classification "is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a 'distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' State v. Evans, 130 Wis. 381, 110 N. W. 241." Borgnis v. Falk Co., 147 Wis. 327.

It will be noticed that both sections under examination here relate to the income of the husband and wife only when living together as husband and wife, and it is at least a permissible inference that the legislature might have had in [fols. 48-53] mind the advantages with respect to the enjoyment of the income, in enacting these sections and providing for a tax based on the aggregate income.

Taking all of the foregoing circumstances together, we cannot say that the classification is wholly arbitrary and unreasonable, or that it is not germane to the purposes of the tax.

By the Court: Judgment affirmed.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] IN SUPREME COURT OF THE UNITED STATES.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Feb. 20, 1931

Appellant, pursuant to Rule 13 (9) of this Court, herewith files this statement.

The points on which appellant intends to rely are:

1. R. S. 71.05 (2d), Statutes of Wisconsin, reading thus:

"In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the

husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation,"

which the Supreme Court of Wisconsin held valid and authorized the tax complained of levied on appellant because of income received by Mrs. Hoeper from her own separate estate, is in law void because in violation of the Fourteenth Amendment to the Constitution of the United States.

2. R. S. 71.09 (4c), Statutes of Wisconsin, reading thus:

[fol. 56] "Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income,"

which the Supreme Court of Wisconsin held valid and authorized the increased rate of tax levied on appellant on his own income because of the income received by Mrs. Hoeper from her own separate estate, is in law void because in violation of the said Fourteenth Amendment.

Appellant thinks the following parts of the record are necessary for the consideration of said questions:

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Dated at Wausau, Wisconsin, this 17th day of February, 1931.

Claire B. Bird, Attorney for Appellant.

[fol. 57] Proof of Service

Service by delivery of copy of the foregoing original statement is hereby admitted this 7th day of February, 1931.

Marathon County of Wisconsin, by Walter A. Graunke, District Attorney.

STATE OF WISCONSIN,
Marathon County, ss:

Claire B. Bird, being duly sworn, on oath, says that, as attorney for appellant, he caused the foregoing original statement to be served on the adverse parties on this 17th day of February, 1931, by mail, by then depositing in the post office at the City of Wausau, Wisconsin, two true and correct copies thereof, each separately and securely sealed, with postage fully prepaid, the one addressed "Theodore W. Brazeau, Special Counsel for Tax Commission, Wisconsin Rapids, Wisconsin", the other addressed "Attorney General of Wisconsin, Capitol Building, Madison, Wisconsin," each being the proper post office address of said addressees respectively, and that there is daily communication by mail between said City of Wausau where said deposits were made and both said Cities of Madison, Wisconsin.

Deponent further says service was also made on Walter A. Graunke, District Attorney of Respondent, Marathon County, as appears by his admission of service above.

Claire B. Bird.

Subscribed and sworn to before me this 17th day of February, 1931. R. E. Puchner, Notary Public, Marathon County, Wisconsin. My commission expires September 33, 1934. (Seal R. E. Puchner, Notary Public, Marathon County, Wis.)

[fol. 58] [File endorsement omitted.]

Endorsed on cover: File No. 35,636. Wisconsin Supreme Court. Term No. 714. Albert A. Hoeper, appellant, vs. Tax Commission of Wisconsin and Marathon County of Wisconsin. Filed February 7, 1931. File No. 35,636.